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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

CHARLES L. CRAIG, PETITIONER, *v.* WILLIAM C. HECHT, UNITED STATES MARSHAL for the Southern District of New York, respondent.	No. 82.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

By this writ of certiorari review is sought of a judgment of the Circuit Court of Appeals for the Second Circuit which reversed an order of the court below sustaining a writ of habeas corpus, and which remanded the petitioner to the custody of the Marshal. (282 Fed. 138.)

STATEMENT OF THE CASE.

The petitioner, Charles L. Craig, was Comptroller of the City of New York, its chief financial officer, and as such a member of the Board of Estimate and Apportionment, the real governing body of the city.

On October 6, 1919, Craig wrote a letter to Lewis Nixon, Public Service Commissioner, which is set

forth on pages 8 to 11 of the record. Copies of this letter were immediately given out for publication from the office of the Comptroller in the manner usually employed to give publicity to the affairs of that office and its chief, and were published in the New York City daily morning and evening papers. Thereupon the United States Attorney filed an information against Craig charging him with contempt of court, and the court made an order directing Craig to show cause why he should not be punished for that offense. Craig appeared, moved to quash the information, demurred to the information, and finally pleaded not guilty. The case then went to trial and after numerous hearings were had and a great volume of testimony and exhibits received, Judge Mayer found Craig guilty of contempt and sentenced him to be imprisoned for a term of sixty days (p. 37)—not six months, as stated by Judge Manton in his opinion (p. 15).

Craig then filed, before Hon. Martin T. Manton, a Judge of the Circuit Court of Appeals for the Second Circuit, a petition for writ of habeas corpus, pursuant to which Judge Manton issued the order upon page 32 of the Record, which is the paper referred to in the case as a writ of habeas corpus. Annexed to the petition, or by its terms made a part of it (pp. 34, 42), were the records of the proceedings before Judge Mayer. On this petition a return was made and to the return a traverse was filed. Judge Manton thereupon took the case under advisement and on

April 29, 1921, announced his decision in an opinion printed on pages 6 to 31 of the Record. His conclusion was that the petition for discharge should be granted, and to the foot of his opinion he appended an order that the papers be filed with the Clerk of the United States District Court for the Southern District of New York and that this order should be recorded in said court and signed it "Martin T. Manton, U. S. Circuit Judge."

No writ of error to review the decision of Judge Mayer was ever taken, and the time to do so has long since expired. The Marshal (at that time Thomas D. McCarthy, for whom the respondent Hecht was subsequently substituted) thereupon took an appeal to the Circuit Court of Appeals for the Second Circuit. The petitioner, Craig, made a motion in the Circuit Court of Appeals to dismiss that appeal, which was denied. He also applied to this Court for a writ of certiorari, or in the alternative for a writ of mandamus, in an attempt to prevent the Circuit Court of Appeals from hearing the appeal on the merits. That petition was denied March 6, 1922. Finally, the appeal was heard by the Circuit Court of Appeals on the merits. That court reversed the determination of Judge Manton and remanded Craig to the custody of the Marshal. (282 Fed. 138.) Craig then applied to this Court for a writ of certiorari. The writ was granted, and thus the case comes before this Court.

THE FACTS.

A proper understanding of the case requires a statement of the facts at some length.

Two great street railroad systems, one in Brooklyn and the other in Manhattan, were in the hands of receivers appointed by Judge Mayer in the United States District Court for the Southern District of New York. Lindley M. Garrison was the Brooklyn receiver and Job E. Hedges was the Manhattan receiver. One of the holding companies allied with the Manhattan railroad companies had been put in bankruptcy by the same court, and James R. Sheffield was Trustee in Bankruptcy of that company. These receiverships had been a matter of great public interest and wide discussion in the City of New York. The matter of a five-cent fare upon these railroad systems was naturally one of deep concern to the traveling public of that city, and the fear that from the receivership proceedings an increase in fare might result had been utilized to the limit for political effect. The Brooklyn Rapid Transit Co. receivership suit was commenced December 31, 1918, and Judge Garrison was made permanent receiver on January 15, 1919 (p. 45). On January 15, 1919, the Public Service Commission for the First District moved for leave to intervene in that suit in the name and on behalf of the City of New York and for the appointment therein of a coreceiver (p. 45). On the same day, pursuant to a resolution of the Board of Estimate and Apportionment, the

Corporation Counsel of New York City applied to the Court for the appointment of Mr. Craig as coreceiver. Judge Mayer denied both these motions in a memorandum which appears on page 46. On January 22, 1919, Judge Mayer made an order directing that notice of all subsequent proceedings in that suit, other than those relating to the ordinary current administration of the receivership, should be given to the Solicitors for the City of New York and the Public Service Commission.

The New York Railways suit was commenced March 20, 1919, and on March 30 the Court appointed Mr. Hedges permanent receiver. Bankruptcy proceedings against the Interborough Consolidated Corporation was begun on March 21, 1919, and on the same day Mr. James R. Sheffield was appointed receiver, and on April 15 he was made trustee (p. 49).

Prior to September 1, 1919, by an order of the court made by Judge Mayer, Stone & Webster, expert engineers, were employed by the receivers to make a report of the financial position of the corporations and the properties involved in the suits, and on September 14 they made a preliminary report. On the filing of that report Judge Mayer filed a memorandum, dated September 6, 1919, containing, among other things, directions to the receiver and trustee to send a copy of the summary of Messrs. Stone & Webster and the court's memorandum to the State and municipal authorities and to civic and taxpayers' associations of New

York City, and in that memorandum Judge Mayer said:

> At the same time the Receivers will make it clear that every facility will be afforded, both to public officials and citizens' associations, to satisfy themselves in respect to the actual financial and other conditions existing in relation to the corporations now in their official charge (p. 50).

On September 8 a copy of the report and of the Court's memorandum was sent to Mr. Craig (pp. 50, 51).

On October 1, 1919, Lewis Nixon, Public Service Commissioner, addressed identical letters to the members of the Board of Estimate and Apportionment, to Receivers appointed by the court, to transit officials, and to representatives of security holders inviting them to attend a conference to be held at the office of the Public Service Commission on the morning of October 6, 1919 (p. 821).

At the time and place designated the conference began, but Craig was not present.

After some discussion the Commissioner concluded that a full and free consideration of the subject matter could be more effectively undertaken in a closed conference and thereupon various spectators and newspaper men left the room (p. 822).

After this had occurred further discussion took place and then the Public Service Commissioner read the letter which he had received from Craig (p. 822). Meanwhile copies of the letter were being distributed

to the press from Mr. Craig's office. On the same day Judge Mayer filed an order directing the United States Attorney to "advise the court by formal information concerning the conduct of one Charles L. Craig on October 6, 1919, at which time he is reported to have published or caused to be published a written communication addressed to Hon. Lewis Nixon, Public Service Commissioner," concerning the orders and action of the court in a pending cause or causes (p. 822).

On November 3, 1919, the United States Attorney filed an information charging petitioner with contempt of court. The information is set forth in full beginning at page 44. After a recital of facts the information charged that in four specific respects the statements in the letter were false and were known by the defendant to be false when made and were made in reckless disregard of the truth. Briefly these statements alleged to have been false were:

(1) That the court in the suits and proceedings referred to was responsible for a policy of denying to the petitioner Craig and other members of the Board of Estimate and Apportionment any access to original sources of information concerning the property and affairs of various public-utility corporations in the hands of receivers appointed by the court, and holding franchises to operate in the streets of New York; whereas, in truth and fact, the court had never adopted such a policy, but on the contrary, had afforded to the petitioner and

the members of the Board of Estimate every facility for obtaining information and had expressly directed that the city and its officials should have access to such information and that neither the court nor anyone acting under its authority had ever denied such access or information.

(2) That the court had made orders which precluded any application being made by the authorities of the city of New York to any other court or judge for any right of examination into the affairs of the public utility corporation; whereas, in truth and in fact, the court had never made any such order.

(3) That the orders of the court denied to the authorities and to the city the opportunity to ascertain the truth; whereas, in truth the court had never made any such order that had or could have such effect, but, on the contrary, had ordered that the city authorities should have every opportunity and facility for ascertaining the truth.

(4) That it was stated that an order of the court stood between the public and the truth; whereas, in truth no order that the court had made had or could have such effect.

Thereafter an order was signed by Judge Mayer requiring the petitioner to show cause on December 2, 1919, "why he should not be declared and adjudged in contempt of this court by reason of the facts set forth in the said information" (p. 825).

Counsel for petitioner appeared specially and raised questions as to the jurisdiction of the court

which were decided adversely to the petitioner. The court then set December 29, 1919, as the time for the appearance of the petitioner (p. 825). The petitioner's next step was to demur to the information on 28 grounds. The court overruled the demurrer and filed an opinion in respect to the questions raised and ordered petitioner to plead to the information. *United States* v. *Craig*, 266 Fed. 230. Petitioner pleaded not guilty and the trial began on May 10, 1920, and was concluded on June 10, 1920. The testimony was transcribed in 791 pages of stenographic minutes. The exhibits were many and voluminous. In response to the request of counsel, and, in view of the length of the record and the many exhibits, the court set a date in the autumn for the submission of briefs. Extensions beyond the original date set were asked for and granted. The case was finally submitted shortly after October 30, 1920 (p. 826).

On February 24, 1921, Judge Mayer decided it, holding Craig to be guilty of contempt and directing that he appear on that day at 2 o'clock in the afternoon "for such further proceedings herein as may be proper" (p. 839). Judge Mayer's opinion concludes as follows:

> It is not a wrong with which the judge concerns himself in a personal sense, and for that reason no personal apology is desired nor required. The wrong has been perpetrated against the administration of justice.

> The reparation which is within the power of the defendant is promptly to make and file in the office of the Clerk of the Court an unqualified retraction of the false statements respecting the court, referred to in Paragraphs 1, 2, 3, and 4 of the information.

The record does not show that Craig availed himself of this opportunity to purge himself of the contempt and he was thereupon sentenced to imprisonment for 60 days.

This outline of the proceedings shows that Judge Mayer did not proceed summarily and that his decision was not the result of personal pique or infirmity of temper. He directed the District Attorney to advise the court and after almost a month of consideration that official filed the information. Thereafter every right of the petitioner was protected by able and astute counsel. The record shows, furthermore, that not merely were his rights guarded by counsel and respected by the court, but that every courtesy was afforded both to counsel and to Craig himself. The final opinion of Judge Mayer shows not only laborious and painstaking care, but the dignity and poise befitting a judge. The only reparation asked was the retraction of charges found beyond all question to have been, not merely false, but devoid of the slightest element of truth. "More in sorrow than in anger" Judge Mayer deliberately and dispassionately vindicated the dignity of his court and the majesty of law, only to have such vindication summarily nullified by a single judge on a writ of *habeas corpus*.

The opinion considers the various elements entering into the offense in detail.

As to publication, it was found that after the letter was dictated the stenographer, pursuant to petitioner's directions, read the letter to the members of the Board of Estimate and Apportionment. It was not marked private or personal and was sent by hand to the Public Service Commissioner, who was then holding the conference previously referred to. All such letters, according to Craig's testimony, are filed in the Comptroller's Office and open for public inspection, and from the practice in the Department of Finance the petitioner knew that such a letter would become public and would be published in the newspapers; and, as a matter of fact, it was given out in the usual course to reporters and representatives of press associations in the form of tissue copies known to the newspaper craft as "flimsies," and was given wide publicity

As to the charge of denial of access to the sources of information regarding the public service corporations, the court (p. 832, 833) reviews the evidence and finds the charge to be false. The finding is based, in part, upon the testimony of Craig himself, that access had never been denied to him, and that he had never made any application of any kind or description for access to original sources of information or any information whatever.

On the question of intent, Judge Mayer reviewed the testimony of Craig to the effect that he did not intend to commit any contemptuous act nor to charge

any wrongful conduct against the court, and that what he said as to the policy of denying access was not intended to refer to any actual occurrences, but to the result which, from his point of view, flowed from the refusal to appoint him coreceiver. Judge Mayer held, however, that it is a fundamental principle that men are held responsible for the natural consequences of their acts, and that the plain meaning of petitioner's language was to charge the court with conduct incompatible with the due administration of justice, that the charges were false, and that the effect was "to obstruct the administration of justice." Citing *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402.

From this conclusion we see no reasonable escape. It is to be remembered that Craig was not an irresponsible and inconspicuous critic or fault finder; he was the chief financial officer of the greatest city in the country, an elected officer of that city, as well as a lawyer of experience, ability, and standing, and a member of the most powerful body in the administration of the affairs of that city. He acted with deliberation. The secretary of his department, to whom he showed the letter, expressed to him the opinion that "it was a pretty strong letter." It was read to the members of the Board of Estimate and was then sent to Mr. Nixon, and the copies distributed to the newspapers.

Mr. Craig in his testimony tries to create the impression that the letter was written under the pressure of important public duties and that the phrase-

ology was due to the fact that he did not regard Mr. Nixon as a man of "quick perceptions of the actual necessity of the situation" nor "of a quick grasp of the verities"; that his mind was slow, and that in order to bring the thing forcibly into his "inner consciousness it was necessary to express the matter with as much vigor and terseness as possible" (p. 607). If his desire had been to express himself in such manner as to make it sure that any person of ordinary or even limited intelligence would gather the impression that he charged the District Court of the United States with gross misfeasance and malfeasance, he could not have chosen his language better.

The nature and obvious effect of the publication of such a letter must have been well understood by a man of his intelligence. He spoke with the prestige of a great office; his voice would be interpreted by the people as that of their city government. It was virtually his proclamation to its citizens that the District Court of the United States was standing between their elected officials, who were aggressively striving to protect their rights and the rights of the city, and the hated traction companies, commonly referred to in that city as "the traction trust," and, by its orders and policies, was preventing the officials from exposing the alleged rascalities of management which, we have been so often told, had characterized the management of those companies.

This challenge the Court met promptly, but with deliberation; fairly, but without fear.

After conviction, Craig had a right of review by writ of error, direct to this Court upon constitutional or jurisdictional grounds, or to the Circuit Court of Appeals on the entire case. Waiving by neglect this remedy provided by statute, he appealed to Hon. Martin T. Manton, one of the judges of the latter Court, by a petition for writ of habeas corpus.

THE PROCEEDINGS BEFORE JUDGE MANTON.

(a) *The right to review by habeas corpus.*

When the proceedings before Judge Manton came on to be heard the question of the power of the court to review by habeas corpus the decision of Judge Mayer was raised by the United States Attorney, and upon that point petitioner's counsel stated his position as follows (p. 880):

> Now, we wish to present these jurisdictional points to your Honor, keeping closely within the confines of the proper office of a writ of habeas corpus, upon the following four heads or propositions: That there was no jurisdiction to punish for contempt and that the court acted in excess of its powers, and without any evidence of contempt, upon the following grounds or subdivisions—First, the communication was privileged, and, incidentally, that there was no publication of it; secondly, that the matter contained in the letter was not contemptuous in substance;

> thirdly, that there was nothing pending sub-judice at the time the letter was written, and as to that, there is an astonishing admission in the return to this writ of habeas corpus, which is sufficient in itself to sustain the writ; and, fourth, that there was no misbehavior such as to obstruct the administration of justice; fifth, the matter that I have referred to before, that there was no prayer to the information, which is a procedural matter.

We have here, then, a recognition by petitioner's counsel that the only question which could be raised on habeas corpus would be that of the jurisdiction of Judge Mayer to hear and determine the case and impose sentence, and we have his statement of the alleged jurisdictional questions to be considered. The record in its entirety taken before Judge Mayer was submitted to Judge Manton, and his opinion shows that he reviewed the case on the merits and reached a conclusion contrary to that of his brother judge.

(b) *The power of a Circuit Judge to issue the writ of habeas corpus.*

Upon the filing of the return and a traverse thereto, the United States Attorney raised the point that a judge of the Circuit Court of Appeals had no authority to award or issue a writ of habeas corpus (pp. 871, 872). Judge Manton overruled this point (p. 873).

Before the return was filed, there was a colloquy between Judge Manton and counsel (p. 870), in which the court said:

> Now, before doing that, Mr. Mooney, do you want this presented to me as Circuit Judge, or do you want to submit it to me as Circuit Judge sitting in the District Court?

To which Mr. Mooney replied, in substance, that he had presented the petition to Judge Manton as a Circuit Judge, but nevertheless he offered to put in proof in a formal way, or ask Judge Manton to take judicial notice of the fact, that he had at that time been designated to sit in the District Court. The United States Attorney called attention to the point that it might involve the question of the right of the party against whom the decision should be made to appeal, and thereupon stated that—

> Mr. Mooney should take a position one way or the other.

To which Mr. Mooney replied:

> I am taking it. I never have any doubt as to what position I am going to take. I am going to take my position exactly as it was when I started, and I am going to keep it, but I am going to do a little bit more than that. I am going to take such a course with regard to the proofs as will render the point suggested by Colonel Caffey an entirely moot or academic point. I shall insist that we shall proceed in the way that we started, and that we proceed in that way to the end.

And the Court said:

> All right.

Thereafter (p. 873) the court denied the motion to dismiss, made upon the ground that the Circuit Judge had no jurisdiction to grant the writ, and then the United States Attorney moved that Judge Manton proceed to hear the application as a District Court, to which the court replied:

> I think that lies largely with the applicant. What do you wish to do about it, Mr. Mooney? (P. 874.)

Mr. Mooney's reply, in substance, was that the writ was issued by Judge Manton as a Circuit Judge, and, in addition thereto, he had been designated formally under the statute to hold proceedings as a District Court, and that there were superadded to his powers any necessary powers and activities of a District Court judge. Judge Manton finally ruled that it rested entirely with Mr. Mooney to proceed as he chose, and denied the motion, "in view of the opposition" (pp. 875, 876). This was on March 19, 1921.

Thereafter, but at the same session, Mr. Mooney called the Chief Deputy Clerk of the United States District Court for the Southern District of New York (p. 881), who produced the designation of Judge Manton to sit in the District Court, which was received in evidence (p. 882), and, by the testimony of the Clerk, it was shown that, following the designation, Judge Manton was actually engaged in the performance of business of the District Court and of the

District judge on the 24th day of February, 1921, when the petition for the writ was presented, and that no judge was attending to the chambers' business in the District Court on that day except Judge Manton (p. 885).

The importance of these facts appears from the claim made before the Circuit Court of Appeals that Judge Manton's order discharging Craig from custody was not appealable because it was a judge's order and not a court order.

(c) *The order of Judge Manton.*

Judge Manton's decision was announced in an opinion printed upon pages 6-31, inclusive, of the Record. It is entitled:

> Before—Hon. Martin T. Manton, United States Circuit Judge. In the Matter of the Application of Charles L. Craig.

and it is signed:

> Martin T. Manton, U. S. Circuit Judge.

At the foot of it and without any caption is the following:

> It is ordered that the papers in this proceeding be filed with the Clerk of the United States District Court for the Southern District of New York, in his Office in the Post Office Building, in the Borough of Manhattan, City of New York, and that this order be recorded in said court. Dated, April 29, 1921.
>
> MARTIN T. MANTON,
> *U. S. Circuit Judge.*

Apparently the opinion and the order were included in one paper, for the only file mark is at the foot of the order and the printed record describes the opinion as—

Order sustaining writ of habeas corpus.

It is obvious that several questions of grave importance affecting the orderly administration of justice in the criminal courts arise upon these facts. The first, of course, is the power of one judge to review a trial held before another judge of equal authority and, in substance, to reverse it; another is the right of a Judge of the Circuit Court of Appeals to issue the writ of habeas corpus; and another is the right of a judge, thus assuming to act, to frame the order which he makes in such way as to permit or prevent its review on appeal, as he may deem proper. If this can be done, any criminal case tried in a United States District Court may be thus nullified and review of the nullifying decision prevented. The record in the case of *David Lamar* v. *The United States*, October Term, 1922, No. 201, decided January 29, 1923, illustrates this point. In the *Lamar case*, Lamar presented his petition for a writ of habeas corpus to Judge Manton on January 6, 1921, and the point was made in that case by the United States Attorney that a Circuit Judge had no power to issue the writ. Nevertheless he assumed jurisdiction and "announced that in hearing the proceeding he would sit as a Circuit Judge and not as a Court" (pp. 47, 48 of that record). While that case was pending before him, the petition in the present case was filed,

as before stated, on February 24, 1921. In deciding the present case, Judge Manton refers to the *Lamar case* and states:

> I have held heretofore that a Circuit Judge has such power. (*In re David Lamar*, N. Y. Law Journal, April 4, 1921.)

According to the record in the *Lamar case*, Judge Manton filed his opinion in that case on March 2, 1921. (See p. 46 of Record in *Lamar* v. *United States*.) The opinion and order in the present case was dated April 29, 1921. On the 3d day of March, Judge Manton entered an order in the *Lamar case* upon his opinion of the day before, entitled "At a stated Term of the United States District Court for the Southern District of New York" (p. 46 of that record). The order was a Court order. And on the same day Lamar presented a petition for appeal to this court, with an assignment of errors, to Judge Manton, who allowed the appeal and admitted Lamar to bail in the sum of $25,000. On the very day that Judge Manton entered his order in the United States District Court in the *Lamar case* and allowed Lamar's appeal—that is, March 3, 1921—in the proceedings in the case at bar, Mr. Caffey, United States Attorney, in the course of the discussion heretofore referred to, addressed Judge Manton as follows:

> It has to do with the question whether after a final decision the party adverse to whom the decision is rendered will be entitled to an appeal, and therefore Mr. Mooney should take a position one way or the other now.

So, in two cases pending before the same judge at the same time, both instituted in the same manner and both involving the question whether the judge was sitting as a judge or as a Court, he entered an order in one case (the *Lamar case*) which unquestionably was appealable as a court order and thereupon admitted Lamar to bail, although he had stated that he was sitting as a Circuit Judge and not as a Court, and in the other case (the present one) he made an order, an appeal from which was questionable, as was pointed out to him, and the right to appeal from which has always been denied by petitioner's counsel, and which is one of the questions now presented to this Court.

BRIEF OF THE ARGUMENT.

1. The Judgment of conviction rendered by the District Court was final and conclusive until reversed on writ of error.

2. The matters litigated before Judge Manton did not involve the jurisdiction of the Court which tried and sentenced the Petitioner, and the proceedings amounted to a mere review on the merits for which a writ of error was the proper remedy.

3. The writ of habeas corpus may not be used as a substitute for a writ of error.

4. A Judge of the Circuit Court of Appeals, since the Circuit Court was abolished, has no power to grant the writ of habeas corpus.

5. The order of Judge Manton was appealable to the Circuit Court of Appeals.

6. The judgment of the Circuit Court of Appeals was correct and should be affirmed.

ARGUMENT.

I.

The judgment of conviction rendered by the District Court was final and conclusive until reversed on writ of error.

The District Court had jurisdiction of the person of the offender and of the offense, and the sentence imposed was within the power of the Court.

There can be no dispute as to jurisdiction of the person. Craig appeared in person (paragraphs 10 and 12 of petition for writ, p. 35; paragraph 7 of return, p. 844; paragraphs 8 and 9 of the traverse, p. 858), pleaded to the information, and testified (pp. 573–724).

It is equally indisputable as a matter of law that the trial court had jurisdiction of the subject matter, the contempt. It had inherent power, independent of any statute, to punish this class of offenses. "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

Ex parte Robinson, 19 Wall. 505, 510.
In re Debs, 158 U. S. 564, 594–596.
Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402, 418.

Section 268 of the Judicial Code confirmed the power already existing. The authority conferred by that statute clearly embraces the class of offenses to which the appellee's offense belongs.

Toledo Newspaper Co. v. *U. S.*, 247 U. S. 402, 418–420.

The sentence imposed by the trial court was within its jurisdiction. This is clear from the language of Section 268, which authorizes punishment by "fine or imprisonment, at the discretion of the court."

Therefore, the proof showed jurisdiction of the person, jurisdiction of the subject matter, and a sentence within the Court's power. No issue of jurisdiction is left. The petitioner urged certain issues of law and fact as affecting the Court's jurisdiction and as being therefore jurisdictional in their nature. They are set forth in paragraph 17 of the petition for the writ (pp. 38 et seq.).

As stated by counsel before Judge Manton, they are reduced to six propositions (p. 880):

1. The letter of October 6, 1919, constituting part of the information, was privileged.

2. The matter contained in the letter was not contemptuous in substance.

3. There was nothing pending *sub judice* before the District Court at the time the letter was written.

4. The alleged misbehavior was not such as to obstruct the administration of justice.

5. There was no prayer to the information.

6. There was no proof that the defendant (petitioner) published the letter in the newspapers.

Therefore, it was argued that the trial court acted in excess of its power and without jurisdiction. The limited scope of a habeas corpus proceeding will be discussed in the next point. It is pertinent, however, to point out here that every one of these

issues was open to review on writ of error from this Court, as the judgment of conviction was unquestionably a final decision. (Sec. 128, Judicial Code; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336–338.)

The first five of these questions were raised in the trial court by a demurrer to the information (pp. 82–86) and were determined by that Court. The sixth proposition, that there was no evidence of publication, is clearly a question of law, and, like the other questions, was reviewable on writ of error.

Assuming that the trial court's determination of every one of these questions was erroneous, none of them would be within the scope of habeas corpus.

In the famous and often-quoted case of *Ex parte Watkins*, 3 Peters, 192, decided in 1830, release by the Supreme Court upon writ of habeas corpus was sought by a prisoner held under a judgment of conviction in the District of Columbia Circuit Court. Chief Justice Marshall thus stated the law applicable to the situation (p. 203):

> An imprisonment under a judgment can not be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous. The Circuit Court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is com-

petent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case as in the other; and must remain in full force, unless reversed regularly by a superior court capable of reversing it.

And that law, we submit, remains unchanged today, the law of the land. We could submit a very broad roll of authorities but content ourselves with referring to the most recent case of *Riddle* v. *Dyche*, decided May 21, 1923.

II.

The matters litigated before Judge Manton did not involve the jurisdiction of the court which tried and sentenced the petitioner, and the proceedings amounted to a mere review on the merits for which a writ of error was the proper remedy.

All the evidence taken before Judge Mayer was placed before Judge Manton as part of the petition for the writ. The only additional evidence was the testimony of the Clerk regarding the designation of the Judge to hold the District Court and the fact that he acted pursuant to the designation. Judge Manton's opinion, after affirming his jurisdiction and citing his previous decision in the *Lamar case*,

cites numerous authorities and reaches several conclusions which are sound, among them that a writ of habeas corpus can not be made to perform the office of a writ of error; that in a contempt proceeding it may be available to relieve a prisoner from the restraint imposed if the judgment is void on the ground that the Court was without power to make it; and if the Court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally. These conclusions are unquestionably sound. He concludes that the determining inquiries to be made by him are:

(*a*) Had the District Judge jurisdiction of the person and subject matter?

(*b*) Was the sentence imposed within its power?

These questions were beyond doubt the only questions which he had the right to consider. He quotes authorities, analyzes the evidence, and observes very properly (p. 27):

> To vindicate the dignity of the Court in compelling respect and obedience, a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers.

His conclusion is that "By no interpretation can the letter be said to have any tendency to embarrass or influence the court so as to prevent a fair trial or a just conclusion in regard to any matter which

was then pending before the Court." In reaching this conclusion he apparently adopts the view of the petitioner Craig. He says (p. 25):

> It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter, taken as a whole, is a criticism of the district judge who denied the application. If the Comptroller were appointed coreceiver, he would have the access he sought as a matter of right. The finding of the district judge is that he had it as a matter of favor. Therefore, it is concluded that the statement of the denial of access is false.

And his conclusion upon the whole matter is that the letter was not contemptuous and the act was not committed in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of the case of *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402. He holds (pp. 27–28):

> The misbehavior must present an interruption which comes between the court and the consideration of the subject matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court. No such conclusion can be reached in the case at bar.

He also holds that there was no cause pending within the rule, and concludes his opinion (p. 31):

> * * * He [Craig] stands convicted upon his letter alone and such inferences as may be

> drawn therefrom. His conviction rests upon an issue between the court and the defendant and it is one of terminology or interpretation.
>
> There is no criminal intent discoverable from this record to support the interruption (*sic*) placed upon it by the Court, nor was there pending *sub judice* a proceeding before the Court at the time the letter was written.
>
> The conclusion is irresistible that the Court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty.
>
> The petition for discharge is granted.

The questions thus considered, it will be observed, are the same questions litigated before Judge Mayer. Judge Manton differed with Judge Mayer as to facts and inferences to be drawn from the facts. That is all. And having decided that Craig was not guilty, he concluded that Judge Mayer was without jurisdiction to find him guilty.

If this be the law, then no court has jurisdiction to try any person until his guilt has first been established as a fact.

But the law is that the findings of the trial court may not be attacked collaterally, nor can the record be examined to see whether there is evidence warranting a conviction.

In *Harland* v. *McGourin*, 218 U. S. 442, 444–449, this Court squarely held that in habeas corpus proceedings it is not open to litigate as to whether there was any evidence warranting a conviction and said (p. 448):

> The contention is that in the respects pointed out the testimony wholly fails to sup-

port the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.

To the same effect see also:

Ex parte Carll, 106 U. S. 521, 523.
In re Debs, 158 U. S. 564, 600.
Matter of Gregory, 219 U. S. 210, 214, 217–218.

III.

The writ of habeas corpus may not be used as a substitute for a writ of error.

(a) *The Court on habeas corpus is limited to jurisdictional questions.*

This Court made an unmistakably clear statement of this proposition in the case of *Glasgow* v. *Moyer*, 225 U. S. 420. There in his petition for habeas corpus the petitioner made the most sweeping allegations of every kind of illegality, including matters of fact and law and constitutional defects. Assuming the truth of all the allegations, the Court declared that they raised no question within the purview of the court on habeas corpus. After citing

several of its own decisions, as illustrative of the principle, the Court said (p. 429):

> The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of habeas corpus can not be employed to retry the issues, whether of law, constitutional or other, or of fact.

Matter of *Gregory*, 219 U. S. 210, 213, 218, is especially enlightening. There the same principle was applied. The defendant had been convicted in a police court of the District of Columbia on a charge embodied in an information. The sole evidence was an agreed statement of facts. It is difficult to conceive a type of inquiry more squarely presenting the question whether on writ of habeas corpus there can be a review of the legality of the conviction. In the opinion of the Court, Mr. Justice Hughes said (p. 213):

> The only question before us is whether the police court had jurisdiction. A habeas corpus proceeding can not be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient, or whether the acts set forth in the agreed statement constituted a crime—that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment.

Again, at page 218, after referring to the Watkins and Parks cases, infra, the Court said:

> In hearing this application this court does not sit to review the correctness of the con-

clusion of the police court as to the violation of the statute by the petitioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for a writ of habeas corpus must be denied.

Harlan v. *McGourin*, 218 U. S. 442, is another illustration of the principle. There petitioners after conviction of a crime sought release upon habeas corpus on the ground that there was a total lack of evidence to sustain the conviction and other similar grounds. The Court dismissed the appeal and declined to consider the questions submitted, saying (p. 448):

> The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of habeas corpus. Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.

(b) *To warrant discharge on habeas corpus, the judgment, upon which the commitment is based, must be not merely erroneous, but absolutely void.*

This proposition excludes from consideration any error, however vital or prejudicial it may be deemed. The remedy for error is by writ of error. The cases on this proposition are so varied and so strongly stated as to leave no doubt of their purport or effect.

The case of *Ex parte Watkins*, 3 Peters, 192, decided in 1830, has already been cited.

Ex parte Parks, 93 U. S. 18, is explicit upon the same point. There release was sought from a court having power to issue a writ of habeas corpus. The ground on which the application was predicated was that the indictment—just as argued in the court below as to the information in the case at bar—did not state an offense. The crime charged was forgery. It was contended that a receipt described in and made the basis of the indictment was not the character of document that was the subject of forgery; just as petitioner says here that his letter was privileged, not contemptuous in substance, not obstructive of the administration of justice, and the like. In disposing of the matter this Court said (p. 20):

> But the question whether it was or was not a crime within the statute was one which the District Court was competent to decide. It was before the court, and within its jurisdiction. No other court except the Circuit Court for the same district, having concur-

rent jurisdiction, was as competent to decide the question as the District Court.

Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings—on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case.

With respect to an identical situation, in *Ex parte Yarbrough*, 110 U. S. 651, 654, this Court said:

Whether the indictment sets forth in comprehensive terms the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law, which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction.

Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but if so it is an error of law made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which can not be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of that court.

In *Matter of Spencer*, 228 U. S. 652, the reason for and the philosophy of the rule which excludes from review on habeas corpus any error that can be reached by writ of error were stated. This Court said (p. 663):

> The sentences imposed on petitioners were therefore not void, but erroneous only, and subject to change or modification by the (State) Supreme Court, or reversal, and the petitioners subject to resentence, and *Ex parte Lange*, does not apply. In *Re Lincoln*, 202 U. S. 278, habeas corpus was denied because there was an appeal from the judgment attached which could have been taken to the Circuit Court of Appeals, applying the rule which we have so often expressed, that the writ of habeas corpus is not to be used as a writ of error. And the reason is manifest. When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal it may be modified or changed and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well.

On this point in *Ex parte Siebold*, 100 U. S. 371, this Court said (p. 375):

> This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of *Ex parte Lange*, 18 Wall. 163, and *Ex parte Parks*, 93 U. S. 18. In the former case we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the

> judgment, whether erroneous or not, was not void because the court had jurisdiction of the case; and we refused to interfere.

While it may be admitted that to some extent a contempt case is *sui generis*, nevertheless it is governed by the general rules applicable to appeals and writs of error. Habeas corpus is not the method of review provided for contempt cases or any class of cases.

Ex parte Kearney, 7 Wheat. 38, a much-cited case, is an excellent illustration. There petitioner, called as a witness in the Circuit Court for the District of Columbia, refused to answer a question because he believed it tended to incriminate him. Having been ordered to answer, he refused to do so and was committed for contempt. He applied to this Court for habeas corpus.

Mr. Justice Story said (p. 42):

> It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction and in the exercise of an unquestionable authority. The only objection is, not that the Court acted beyond its jurisdiction but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the Court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a habeas corpus, after judgment on an indictment for an

> offense within the jurisdiction of the circuit court, it could hardly be maintained that this Court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; *for when a Court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution;* and so the law was settled upon full deliberation, in the case of Brass Crosby, Lord Mayor of London (3 Wilson, 188). [Italics ours.]

Justice Story pointed out that the latter was a case of a person committed by the House of Commons for contempt, who sought relief by habeas corpus. He quotes Lord Chief Justice De Grey, who there said:

> The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this Court do? It can do nothing when a person is in execution by the judgment of a Court having a competent jurisdiction. In such a case this Court is not a court of appeal.

Mr. Justice Blackstone is also quoted as saying in the *Crosby case:*

> The sole adjudication of contempt, and the punishment thereof, belongs exclusively and without interfering to each respective court. *Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempt of others.* [Italics ours.]

Judge Story then concludes:

> So that it is most manifest, from the whole reasoning of the Court in this case, that a writ of habeas corpus was not deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction; and that, if granted, the Court could not inquire into the sufficiency of the cause of commitment.

There has never been a suggestion in any report that this doctrine has been reversed or modified. On the contrary, this case has been cited often with approval. Its doctrine has been affirmed repeatedly and it is the law to-day.

Application to the case at bar.

The case at bar is plainly within the general rule. As has already been argued, the trial court that committed the Petitioner had jurisdiction of him, and of the offense, and the sentence was authorized by Section 268 of the Judicial Code.

Judge Manton accepted the contentions of the petitioner in two respects. He placed an innocuous interpretation upon the letter which was the basis of the contempt charge, and he decided that there was nothing pending *sub judice* when the letter was published. *That is, he reversed Judge Mayer's findings of fact, and made contrary findings.* For these reasons he concluded that the trial court had no jurisdiction to punish the appellee for contempt. It is respectfully submitted that neither matter was jurisdictional and

therefore both were outside the Court's province on habeas corpus.

That the first of these propositions could not be considered on habeas corpus has already been made clear. The sufficiency of the evidence is not before the Court. It is clearly distinguished from jurisdictional questions.

> *Harlan* v. *McGourin*, 218 U. S. 442, and the other cases cited above.

If the proposition might properly be argued here, it could readily be maintained and could easily be demonstrated that a publication was contemptuous which charged the trial court, in the midst of a protracted receivership, with denying public officials the opportunity to ascertain the truth (p. 54, fol. 162), with the "monstrous" offense of standing between the public and the truth (p. 55, fol. 164), with forcing public officials into a contest with corporate powers entrenched in darkness and concealment (p. 55, fol. 165), and with responsibility for turmoil, delay, and dissatisfaction resulting from various orders of the Court (fol. 165). It is respectfully suggested that the rule laid down by Judge Manton, that when the language used is not *per se* libelous, the intention of the offending party is a factor and may control (p. 26, fol. 78), is not the law. Even if it were, the intention of the accused would be a question for the trial court to consider. It has nothing to do with jurisdiction.

As to the contention that there was nothing pending *sub judice* at the time of the publication,

if it be assumed that this is an essential element of the crime, it is to be determined, like every other element, by the trial court. The determination of that Court, if erroneous, might be corrected on writ of error.

If we were at all concerned with that question here (and we are not), it might be pointed out that the contemptuous criticism was not limited to a single past order, but referred to a continuing policy in the receivership, which was undoubtedly pending (fol. 158), to many orders made in that receivership (fols. 162, 165) and the writer sought to procure the entry of other orders in the future (fol. 166). This question was carefully considered and effectively disposed of by the trial court in its opinion. (Vol. II, fols. 2480–2491.)

(c) *The exceptions to the general rule as to the scope of habeas corpus do not include the case at bar.*

There are only five classes of cases in which the Court on habeas corpus will go beyond the question of jurisdiction. These are the five exceptions:

1. Where there is a conflict of jurisdiction between a State and the United States.

2. Where the authority and operations of the Federal Government are or may be interfered with by State action.

3. Where rights or obligations of the United States under a treaty are involved.

4. Where the petitioner is held under State process based upon a State law which is in violation of the Constitution of the United States.

5. Where the judgment or order under which he is held is a nullity because in excess of the power of the Court.

This classification is based upon an analysis of *Henry* v. *Henkel*, 235 U. S. 228–229, and the cases there cited:

> But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.

The first and second exceptions are closely related. The fundamental reason for the first four exceptions is the necessity of employing habeas corpus in order expeditiously and adequately to maintain the supremacy of Federal laws and treaties in compliance with Section 2 of Article VI of the Constitution. (See *Tarble's case*, 13 Wall. 397, 406–407, 410–411; *Tennessee* v. *Davis*, 100 U. S. 257, 262; *Cunningham* v. *Neagle*, 135 U. S. 1, 73; *In re Watts*, 190 U. S. 1, 27.)

Illustrations of the first and second exceptions are *In re Loney*, 134 U. S. 373, explained in *New York* v. *Eno*, 155 U. S. 89, 96–97; *Tarble's case*, *supra*; *Boske* v. *Comingore*, 177 U. S. 459, 466–467; *Cunningham* v. *Neagle*, *supra*, and possibly *In re Watts*, *supra*, hereinafter discussed. These are cases of urgency.

The third exception, essential to assure the fulfillment of treaty obligations and the proper conduct of foreign relations, is illustrated *In re Mayfield*, 141 U. S. 107, and is commented upon in *Ex parte Royall*, 117 U. S., at pages 251–252; *Cunningham* v. *Neagle*, 135 U. S., at page 74; *Boske* v. *Comingore*, 177 U. S., at page 466; and *Re Lincoln* 202 U. S., at pages 180–182.

As to the fourth exception, under which the validity of State laws, claimed to infringe the Federal Constitution, is sometimes tested on habeas corpus, *Ex parte Royall*, 117 U. S. 241, 247–250, 252–253, is the best example. The power of the Court in this class of cases is purely discretionary. In the *Royall case* the Court declined to exercise it on behalf of the petitioner. This subject is also discussed and the cases are collected in *Re Lincoln*, 202 U. S., at pages 180–182.

In these four exceptional classes of cases the writ of habeas corpus is employed whenever the Federal Courts are confronted with the duty of maintaining the supremacy of the laws, the treaties, and the Constitution of the United States against attack by the States. The applicant for the writ in these cases has no absolute right to it, except where it is expressly given by statute. The granting of this extraordinary relief rests in the Court's discretion and is exercised sparingly and only in an emergency.

Examples of the fifth exception, which may be called cases involving excess of power, are *Ex parte Lange*, 18 Wall. 163, 175–177; *Hans Nielsen, petitioner*, 131 U. S. 176; and *Ex parte Hudgings*, 249 U. S. 378. The petitioner strives to bring himself within this exception.

The *Hudgings case* was entirely *sui generis*. It stands alone. The District Judge, while presiding at a trial, formed the opinion that a witness, then testifying, had committed perjury by asserting and reiterating that he could not recall having seen certain persons write, although he had frequently associated with them. Thereupon, without any charge being preferred, without any proof of guilt being offered, without any evidence, without any hearing or any kind of legal proceeding, the Court ordered the imprisonment of the witness for contempt by the commission of perjury, for an indefinite term and until he should purge himself of the alleged contempt by testifying flatly the reverse of what he had stated to be the truth. Under these extraordinary circumstances, possibly in the exercise of its supervisory jurisdiction over District Courts, this Court, after hearing and leave granted on a rule to show cause, received a petition for habeas corpus, and reviewed the action of the District Court.

In doing so, it placed a salutary and undoubtedly a necessary restriction upon the power of the Courts to punish for perjury as contempt, which was being rather broadly construed by some of the lower

Courts. At the same time Chief Justice White stated that the case was exceptional (p. 384):

> In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, *we are of opinion that the case is an exception to the general rules of procedure* to which we have at the outset referred, and therefore that our duty exacts that we finally dispose of the question in the proceeding for habeas corpus which is before us. It is therefore ordered that the petitioner be discharged. [Italics ours.]

There is no analogy in the *Hudgings case* to the case at bar. The offense of the petitioner here occurred on October 6, 1919. The intervening time between that date and this has been consumed in legal proceedings of a most thorough and deliberate nature.

An information that was informing of the charge in the fullest sense was filed, and an order to show cause was served upon the appellee. Objections to the jurisdiction were made, fully heard, and fully argued. A demurrer and a motion to quash were exhaustively argued. These matters occupied several months. After they had been disposed of, the defendant pleaded. Still later he was tried, the trial lasting many days. Briefs on the various

questions raised were submitted and considered. Finally, on February 24, 1921, sentence was passed on the appellee, and the habeas corpus proceedings that eventuated in this appeal began the same day.

The trial court had made the fullest inquiry into all the facts, a great amount of proof was received, and many questions of law and fact were decided. Can it be said that a course of legal procedure so deliberate and thorough, even though we assume for the sake of argument that it was pursued in error, presented an emergency which called for a remedy of exceptional expedition? Was there anything in it that required departure from the ordinary procedure and dispensed with a writ of error?

A consideration of the charge made against the petitioner, especially that part of which specifically alleges that the publication tended to obstruct the administration of justice (fols. 176–178) and of the trial court's finding that the tendency and effect of the publication were to obstruct the administration of justice (fols. 2481–2485, 2490–2491, 2507), will serve further to differentiate the *Hudgings case* from the case at bar.

Ex parte Lange, 18 Wall. 163, is another exceptional case of this type, which was cited by Judge Manton. There the sentence was imposed under a statute that authorized fine or imprisonment. The Court inadvertently imposed both fine and imprisonment. The defendant paid the fine. After he had done so and had been five days in jail, the Court changed its judgment by imposing the im-

prisonment alone. The fine had passed into the treasury. Under these circumstances it was held that the defendant had suffered one of the alternative punishments provided by the statute, the fine, and it was beyond the power of the Court to impose the other punishment.

In its opinion this Court reaffirmed the principle that it could not review on habeas corpus an erroneous judgment. It concluded, however, that the judgment was not merely erroneous but absolutely void (pp. 175–176).

Hans Nielsen, petitioner, 131 U. S. 176, has also been cited as a case of excess of power. That was an appeal to the Supreme Court from a final order of the District Court denying habeas corpus. The ground of the application was that the defendant, having suffered one term of imprisonment for a crime, was sentenced to serve another term for the same offense. The Court reaffirmed the general principle limiting the scope of habeas corpus, but treated the case as an exception (p. 182). It held that the judgment was void for lack of power to render it (pp. 183–185, 190).

Counsel for petitioner in the court below cited a number of exceptional cases as authorities for the action taken in the case at bar. One of these, *Ex parte Bridges*, 2 Woods, 248; 4 Fed. Cases, No. 1862, pages 98, 103, 105, was substantially identical in facts with the *Loney case*, 134 U. S. 372, heretofore used by us as an illustration of the second exception.

Bridges was indicted in a State court for perjury committed before a United States Commissioner.

He was discharged on habeas corpus upon the ground that the offense was a Federal one cognizable only by the Federal courts and that the State court had no jurisdiction (p. 105).

In re Mayfield, 141 U. S. 107, was also cited. It plainly comes within the third exception. Mayfield was accused of crime committed in the Indian country. The Supreme Court discharged the petitioner from custody upon the ground that as a member of the Cherokee Nation, under a treaty of that Nation with the United States and under the Acts of Congress, he was amenable only to the tribunals of his Nation, and the United States District Court, which held him, had no power to do so.

In re Watts and Sachs, 190 U. S. 1, was another case cited by counsel for the petitioner. *There the Supreme Court intervened by certiorari and habeas corpus in a conflict between State and Federal Courts and the case was heard on a bill of exceptions.* Apparently, therefore, the Court took jurisdiction by certiorari, and employed habeas corpus in aid of its jurisdiction, for the purpose of enlarging the prisoners. Assuming, however, that the case were one of habeas corpus alone, it is essentially different from the case at bar, and the rule there applied is inapplicable here.

There was a direct conflict between the State and Federal Courts, each claiming jurisdiction over the same subject matter. Both had jurisdiction. The question was, which was paramount. Both

were subordinate to the United States Supreme Court, which has for such purposes general supervisory jurisdiction. The case is therefore within the first exception.

There is another situation sometimes occurring on habeas corpus that it may be suggested constitutes an exception to the general rule. It is not an exception, but if it were, it could have no application to the case at bar. Where there is a lack of jurisdiction in the lower court or its judgment is void, an appellate court, *authorized to review its action on writ of error*, may grant relief by habeas corpus, instead of remitting the applicant to his remedy by writ of error. (*Ex parte Siebold*, 100 U. S. 371.) But such power can be exercised, as is clearly shown in the *Siebold case*, only by a court having supervisory jurisdiction, from which a writ of error would lie, and only when the judgment assailed is void (100 U. S. at page 375). (See also *Matter of Spencer*, 228 U. S. 652, 653.)

As heretofore indicated, the enumerated exceptions are merely the instances in which, because of the absence of other forms of remedy, it is necessary to resort to habeas corpus in order to assure the rights of persons restrained of liberty and are in effect mere interpretations of Section 753 of the Revised Statutes. A survey of the illustrations of the exceptions mentioned above shows clearly that, save, possibly, as to the first, they occur where the sentencing court was either entirely without or exceeded its jurisdiction.

It seems manifest that the case at bar is not embraced within any of these exceptions. However erroneous—if erroneous at all—may have been the rulings of the District Court, the procedure was regular and in conformity with settled practice with respect to subject matter of which that Court had jurisdiction. There was no conflict in jurisdiction between the State and Federal authorities; there was no State interference with the operations of the general government; no treaty was involved; the constitutionality of no State law was assailed; the power of the Court under Section 268 of the Judicial Code was not exceeded; and Judge Manton was not an appellate court, authorized to review, by writ of error or otherwise, the action of the District Court.

IV.

Since the Circuit Court was abolished, a Judge of the Circuit Court of Appeals has no power to grant the writ of habeas corpus.

The Circuit Court of Appeals in deciding this case (282 Fed. 138; Record, p. 1131) considered three questions:

> 1. The power of a Judge of the Circuit Court of Appeals to grant or to issue a writ of habeas corpus.
>
> 2. Whether or not the paper signed by Judge Manton and described as a writ of habeas corpus was in reality such a writ.
>
> 3. Whether the case was one within the power of a court to review by habeas corpus.

The latter question has already been discussed.

(a) *The power of a Circuit Judge to issue or grant the writ of habeas corpus.*

In his opinion Judge Rogers discusses this question at length and reaches the conclusion that since the Circuit Court was abolished a so-called Circuit Judge or Judge of the Circuit Court of Appeals as such has no power to grant a writ of habeas corpus. His reasoning seems to us to be conclusive, and of course no Judge is disposed lightly to limit his own power or authority. The argument briefly runs as follows:

The issuance of the writ of habeas corpus is governed by Sections 751 and 752 of the Revised Statutes, which provide:

> SEC. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus.
>
> SEC. 752. The several Justices and Judges of the said Courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

It is to be noted that under Section 751 the power to *issue* the writs is given to the named *courts*, while the power given by Section 752 to the several Justices and Judges of the "said courts" is to *grant* the writs; that is, to direct that the writs *issue* out of the Courts.

The Circuit Courts were established by the Judiciary Act of 1789. (1 Stat. 74, Sec. 4.) It was eighty years later that the office of Circuit Judge was established by Section 2 of the Act of April 10,

1869. (16 Stat. 44.) (See *Bunn, United States Courts*, pages 37, 38, 40, and 41.)

The Act of 1869 conferred on the Circuit Judge for his Circuit "the same power and jurisdiction therein as the Justice of the Supreme Court allotted to the Circuit," commonly called a Circuit Justice. This was continued by Section 607 of the Revised Statutes down to the adoption of the Judicial Code.

By the Act of March 3, 1911, abolishing the Circuit Court and transferring its powers to the District Court, there were repealed in explicit terms Section 607 of the Revised Statutes and all statutes of date prior to February 1, 1911, authorizing the appointment of Circuit Judges.

Act of March 3, 1911 (Judicial Code), 36 Stat. 1087, §§ 289, 291, 297.

The language of Section 297 of the Judicial Code on this subject is this:

> SEC. 297. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed, * * * Sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; * * *.
>
> All Acts and parts of Acts authorizing the appointment of United States Circuit and District Judges, * * * enacted prior to February first, nineteen hundred and eleven.

The consequences of these repealing provisions are that (1) all appointments of Circuit Judges made since 1911 have been exclusively under the authority of the Judicial Code; and (2) all Circuit Judges

have been deprived of the powers of a Circuit Justice which they had exercised prior to 1912.

It follows that the only sources to which we can go to ascertain whether a Circuit Judge now has, or since 1911 has had, authority to issue a writ of habeas corpus are the Judicial Code and Section 752 of the Revised Statutes.

The Judicial Code, Sections 117 and 118, confers no authority on a Circuit Judge to issue an original writ of habeas corpus. Except when he holds the District Court by assignment or sits under some special statute like the Expedition Act of February 11, 1903 (32 Stat. 803), the sole functions of a Circuit Judge are as a member of the Court of Appeals and are distinctly appellate. (See *Whitney* v. *Dick*, 202 U. S. 132; *McLish* v. *Roff*, 141 U. S. 666; *Lau Ow Bew* v. *United States*, 144 U. S. 55–56.)

Reverting now to Sections 751 and 752 of the Revised Statutes, it will be noted that the power conferred by Section 752 is upon "the several justices and judges" of "the Supreme Court and the Circuit and District Courts." No power is conferred by this section on a Circuit Judge, *qua* Circuit Judge. Who, then, were the Judges of the Circuit Court embraced within the language of Section 752 during the period of the existence of that Court?

From 1789 to 1869 they were only the Circuit Justices and District Judges. (Judiciary Act of 1789, Sec. 4; 1 Stat. 74.) From 1869 to 1911 they were these and the Circuit Judges, as shown by Section 609 of the Revised Statutes, which provided

that Circuit Courts "shall be held by the circuit justice, or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together."

When the statutes conferring on Circuit Judges the authority to hold Circuit Courts (Revised Statutes, Sec. 609), and the powers of Circuit Justices (Sec. 607) were expressly repealed by the Judicial Code, of necessity Circuit Judges ceased, within the meaning of Section 752 of the Revised Statutes, to be Judges of the Circuit Court. This would be true even though the Circuit Courts had continued to exist after 1911. It would seem the more particularly obvious as to Circuit Judges appointed subsequent to 1911 who, because of the abolition of the Circuit Courts, were never Judges of any Circuit Court.

There was never conferred on any Circuit Judge, *qua* Circuit Judge, the power to issue a writ of habeas corpus. There is no such thing as a Judge of an abolished court. There can be no power in a Judge as a Judge of that court after the court itself has ceased to exist.

The effect of the Judicial Code having been to merge the Circuit Court into the District Court, if any power of the Judge of the Circuit Court after 1911 continued by force of Section 752 it passed by virtue of the merger to the Judge of the District Court.

It is doubtless true that prior to the abolition of the Circuit Courts and the repeal of Sections 607 and 609 of the Revised Statutes in 1911 the language of

Section 752 was sufficient, as said in *Fong Yue Ting* v. *United States*, 149 U. S. 698, to include all Judges of the United States. Prior to the Judicial Code the judicial officers of the Supreme, Circuit, and District Courts, who under then existing laws could be assigned to hold Circuit and District Courts, composed the entire Federal judiciary; but it by no means follows that after the Circuit Court and the authority of a Circuit Judge to hold the Circuit Court were expressly abolished, the expression "Judge of the Circuit Court" continued to include a Circuit Judge. The source of the authority having ceased, the authority itself necessarily terminated.

There being other ample provision for judicial inquiry into the restraints of liberty, there is no cause to construe Section 752 of the Revised Statutes as authorizing Circuit Judges to grant writs of habeas corpus in order to prevent failure of constitutional guaranty against suspension. *Whitney* v. *Dick*, 202 U. S. 132, 135; *Matter of Tracy*, 249 U. S. 551.

In *Whitney* v. *Dick*, this court distinctly held that, the Court of Appeals Act not providing in terms authority for that Court to issue a writ of habeas corpus as an original and independent proceeding, it had no power so to do.

(b) *The so-called writ of habeas corpus was void.*

The paper signed by Judge Manton which constituted the so-called writ of habeas corpus appears on page 32 of the Record. It is not addressed to

anybody, it bears the seal of no court nor the signature of the Clerk, and is merely signed "Martin T. Manton, U. S. C. J." Judge Rogers comments upon this (282 Fed. 145, Record pp. 1141, 1142), and holds that the writ of habeas corpus, like the writs of error, certiorari, and mandamus, should be issued under the seal of the court; that in the United States, the writ always runs, in Federal Courts, in the name of the President of the United States, and, in the State Courts, in the name of the State or of the people, citing *Church on Habeas Corpus*, 2d ed., sec. 110; while in the present case, the writ did not run either in the name of the President or in that of anybody else, and was not addressed to the United States Marshal or to anybody else. He concludes, however, that regardless of what validity the original writ possessed it appears to have been treated by all parties as valid.

Judge Hough, in his concurring opinion (282 Fed. 153, Record, pp. 1159, 1160), also discusses the question and reaches the conclusion that the so-called writ was a nullity, but joins the other members of the court in considering the matters argued, as though the Circuit Judge, authorized to hold and holding a District Court, had allowed the writ of habeas corpus to issue out of that Court and, upon the return of the writ, had directed the relator to be discharged.

In passing, it may be noted that Section 911 of the Revised Statutes provides that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue,

and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence, and those issuing from a District Court shall bear teste of the judge, or, when that office is vacant, of the clerk.

V.

The order of Judge Manton was appealable to the Circuit Court of Appeals.

It is obvious that the procedure adopted by the petitioner was intended to involve the case in as many technicalities as possible, and to prevent, if possible, a review of the merits by any appellate court. This was shown at the outset by refraining from suing out a writ of error, and instead thereof resorting to habeas corpus. He evidently had in mind the procedure followed in the case of *Carper* v. *Fitzgerald*, 121 U. S. 87 *infra*. Having in mind, also, the possibility of an adverse decision upon the power of a Circuit Judge to issue the writ of habeas corpus, he took the precaution to fortify his position by the fact that Judge Manton was at the same time holding by designation a term of the District Court. Having succeeded in procuring a favorable decision from Judge Manton, he claims that the order made was not appealable to a Circuit Court of Appeals because it was a Judge's order and not a Court order. Throughout the proceedings before

Judge Manton he was unwilling to commit himself, but having won, he took the position before the Circuit Court of Appeals, and now, that the order was not appealable. In other words, if necessary to sustain jurisdiction, Judge Manton was sitting in the District Court, but to prevent review on appeal, he was sitting as a Circuit Judge.

The Circuit Court of Appeals refused to be misled by such reasoning and regarded the order discharging the petitioner from custody as an order of the District Court, made by a Judge sitting in that Court, and therefore appealable. (282 Fed. 145; Record, p. 1141.) This conclusion, we submit, is sound in view of the facts shown by the record, already stated, and it is unnecessary to add anything to the reasoning of the Judges of the Circuit Court of Appeals.

Even though the order be regarded as a Judge's order, it was nevertheless appealable.

An appeal lies from the order of a judge to the Circuit Court of Appeals.

Webb v. *York*, 70 Fed. 753.
United States v. *Fowkes*, 53 Fed. 13.
Duff v. *Carrier*, 55 Fed. 433.
In re Starr, 56 Fed. 142.

The case of *Webb* v *York*, *supra*, was decided by the Circuit Court of Appeals for the Eighth Circuit May 18, 1896, and that court held that it had jurisdiction of an appeal from the final decision of a district judge at Chambers in a habeas corpus case

as well as from the final decision of the District Court. In that case the court said:

> Prior to the act of March 3, 1891, creating Circuit Courts of Appeals (26 Stat. 826, c. 517), an appeal lay from such orders to the Circuit Court for the district by virtue of section 763, Rev. St. U. S., which reads as follows:
>
> "SEC. 763. From the final decision of any court, justice, or judge inferior to the Circuit Court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard. * * *"
>
> In the case of *U. S.* v. *Fowkes*, 3 U. S. App. 247, 3 C. C. A. 394, 53 Fed. 13, it was held that the act of March 3, 1891, supra, operated to divest the Circuit Courts of their appellate jurisdiction in habeas corpus cases, under section 763, and that by virtue of the provisions of the act of March 3, 1891, the various Circuit Courts of Appeals had acquired the jurisdiction to review the decisions of District Courts in habeas corpus cases that had previously been exercised by the Circuit Courts. This conclusion, we think, was fairly warranted by the following clause of section 4 of the act of March 3, 1891, to wit:
>
> "SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals, by writ of error or otherwise, from said District Courts

> shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established. * * *"
>
> (See also *Duff* v. *Carrier*, 5 C. C. A. 177, 55 Fed. 433.)

The court reasoned that unless the Act of March 3, 1891, is construed as lodging in the Circuit Courts of Appeals the appellate jurisdiction under section 763, the right of appeal granted by that section was lost, because no court had been designated in which appeals in such cases might be taken. The fact that the right of appeal was not abolished in so many words furnished a persuasive inference that Congress intended to designate a court to hear and determine such appeals, citing *McLish* v. *Roff*, 141 U. S. 661, and *Lau Ou Bew* v. *United States*, 144 U. S. 47, as authority for the proposition that it was the purpose of the Act of March 3, 1891, to distribute the entire appellate jurisdiction theretofore exercised by the Federal courts between the Supreme Court and the Circuit Courts of Appeals. The court held that it was the intention of Congress to confer on the Circuit Courts of Appeals the right to hear appeals from final orders made by district judges in habeas corpus cases as well as to hear appeals from final decisions of District Courts made in such cases and said: "We can conceive of no reason why the right should be denied in the one case and granted in the other, and such we believe was not the intent of the lawmaker." The reasoning in that case is upheld in the other case cited.

United States v. *Fowkes*, 53 Fed. 13, decided by the Circuit Court of Appeals for the Third Circuit November 10, 1892, held that under the Act of March 3, 1891, the Circuit Courts of Appeals have succeeded to the appellate jurisdiction of the circuit courts under section 763 of the Revised Statutes, for if an appeal could before the creation of the Circuit Court of Appeals have been taken to the Circuit Court it was now cognizable by the Circuit Court of Appeals as the lawful successor of that court with respect to such appellate jurisdiction.

The case of *Carper* v. *Fitzgerald*, 121 U. S. 87, held that there was no appeal from an order of a circuit judge as distinguished from a Circuit Court to the *Supreme Court*, but the question of appealability to the Circuit Court of Appeals was not involved. That case was decided in 1887, when there were, of course, no Circuit Courts of Appeal and, as pointed out by the court, the Act of March 3, 1885, c. 353, 23 Stat. 437, gave an appeal to the Supreme Court, in habeas corpus cases, only from the final decision of a Circuit Court.

The Act of March 3, 1885, referred to by the court, amended section 764 of the Revised Statutes. When that Act was passed, section 763 of the Revised Statutes authorized an appeal to the Circuit Court from the final decision of any "court, justice, or judge inferior to the Circuit Court" upon application for a writ of habeas corpus or upon such writ when issued (1) in the case of a person alleged to be restrained of his liberty in violation of the Constitution

or any law or treaty of the United States and (2) in the case of a prisoner who, being a subject or citizen of a foreign State and domiciled therein, is in custody by or under the authority of law of the United States or any State, etc., the validity and effect whereof depended upon the law of nations, etc.

Section 764, prior to the Act of March 3, 1885, provided "from the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described *in the last clause* of the preceding section."

The Act of March 3, 1885, amended section 764, so as to provide that "from the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described *in the preceding section*."

Carper v. *Fitzgerald*, therefore, did not hold that an order made by a circuit judge was not appealable to the Circuit Court to which an appeal could theretofore have been taken under section 764, but that the amendment of 764 did not allow the appeal to be taken to the Supreme Court. Nor did *McKnight* v. *James*, 155 U. S. 685, hold that an order of the circuit judge was not appealable. The court in that case, referring to its decision in *Carper* v. *Fitzgerald*, distinctly recognized the difference between appeals to the *Circuit Court* from the decision of a court, justice, or judge inferior to that court and an appeal from that *court* to the *Supreme Court*.

The broad wording of section 6 of the Circuit Court of Appeals Act, 26 Stat. 826, although it did not expressly provide for an appeal to the Circuit Court of

Appeals from the order of the judge, has been construed to authorize such an appeal. *United States* v. *Gee Lee*, 50 Fed. 271; C. C. A. 9th Circuit, April 18, 1892. There a district judge had reversed the order of the Commissioner deporting a Chinese person. An appeal was taken from the judge to the Circuit Court of Appeals. The Act under which the appeal from the Commissioner was taken (sec. 13, Act of September 13, 1888, 25 Stat. 479) authorized such an appeal to the "judge of the District Court for the district." The court, after considering section 6 of the Act of 1891, creating the Court of Appeals and providing that it should exercise appellate jurisdiction to review by appeal or writ of error final decisions of a District Court in all cases other than those provided for in the preceding section, held that the words "judge of the District Court" might properly be regarded as the equivalent for the "District Court," and that a writ of error would lie to review the judgment. The court said:

> We are of the opinion that the statute should be so read. The learned Judge of the District Court, from the allowance by him of the writ of error, evidently so thought. Every argument of utility and convenience favors this conclusion. Uniformity of decision in a very important matter will thus be secured.
>
> "Judge of the District Court" and "District Court" are not, strictly speaking, convertible terms. But they are so in a popular sense,

and it is safe to assume that Congress, in the use of the former phrase, in this connection, intended to give the party an appeal to the District Court of the District.

VI.

The judgment of the Circuit Court of Appeals was correct and should be affirmed.

It may be that this brief has been extended to inordinate length, but the case presents, as we have heretofore stated, questions of great importance in the administration of the criminal law.

Misuse of the writ of habeas corpus is becoming increasingly prevalent. Two conspicuous instances came before this Court the last term, *Lamar* v. *United States* (January 29, 1923) and *Riddle* v. *Dyche* (May 21, 1923). Several more are on the present docket. This Court has again and again condemned the practice of substituting a habeas corpus for a writ of error, or utilizing it as a second writ of error, but some members of the bar still share the view of Sam Weller that "the have-his-carcass next to perpetual motion is vun of the blessedest things as was ever made." There is this important difference in the analogy, for Mr. Weller used the famous writ to get into the Fleet to help Mr. Pickwick, while too many lawyers still feel that the writ may be used to keep out of prison men who have offended the law, had their day in court, and been fairly convicted. After all this Court has said about the difference between writs of error and writs of habeas corpus, it is nevertheless becoming more and more difficult to execute

a sentence after conviction of the criminal. There seems to be no finality. After conviction, and even after an affirmance upon writ of error, some so-called constitutional question is conjured up by superacute ingenuity of counsel, upon which relief by writ of habeas corpus is sought, and whether the writ is sustained or dismissed, the offender is admitted to bail, an appeal is taken, and the whole process of bringing it finally to this court begins anew. In the meantime the salutary value of a vindication of the Court's dignity and authority is largely lost, at least so far as the public mind is concerned, by inordinate delay.

This record presents the situation in a most aggravating form. Not only was there no attempt to review the conviction in the orderly manner prescribed by law, but, by deliberate avoidance of that method, an appeal to another Judge was substituted, and the attempt was made to shape the proceedings so that no review of his decision could be had. The result has been intolerable delay, great and unnecessary expense, and an offender against the administration of justice still unpunished. Under the habeas corpus method the question of the guilt or innocence of the accused fades away, and the question of the authority and jurisdiction of the courts takes its place. The Judge and not his contemnor is thus put on trial. The offense took place four years ago and may have been forgotten by many people in the City of New York, but the vital question of the capacity of the

courts of the United States to maintain their authority through the orderly procedure prescribed by law still remains to be decided.

We ask this Court to affirm the judgment of the Circuit Court of Appeals and to hold that the District Court held by Judge Mayer had jurisdiction to entertain the complaint against Craig and to try him, convict him, and sentence him; that Judge Manton, whether he acted as a Circuit Judge or as a Judge sitting in the District Court, had no right to free him upon habeas corpus; that the order which he made, whether it be considered a Judge's order or a Court order, was appealable to the Circuit Court of Appeals; and that in reversing that order the Circuit Court of Appeals did right.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

OCTOBER, 1923.

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